In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1942

No. 968

BENGUET CONSOLIDATED MINING COMPANY (a corporation),
Petitioner,

vs.

IDONAH SLADE PERKINS, SAMUEL I. HARTMAN as Receiver, HARTFORD BEAUMONT and GEORGE A. FERRIS,
Respondents.

BRIEF FOR RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INTRODUCTION.

Petitioner's counsel seek at the outset to attract the interest of this Court, by the time honored precedent, established in the defense of weak causes, of calling the case one of the "most extraordinary ever to come before this Court," and then, by forgetting a little of the evidence at one point and substituting argument for facts at another, giving the cause an atmosphere of outrageous disregard of Petitioner's constitutional rights.

But no amount of adornment or camouflage of the cold record can hide the bare fact that what petitioner would have this Court do, is to hold that a corporation is a necessary party to a suit between two claimants to its stock (in which it concedes it is without interest) because, pending the dispute, it favored one of the claimants by paying the dividends to him—and that therefore, a *final* judgment determining title in one of them has no binding effect upon the corporation.

In the belief that a clear cut statement of the facts involved will reveal the total absence of equity or of legal right in petitioner's appeal to this Court, we shall, as briefly as possible, relate the train of events appearing in the record now before the Court.

THE FACTS IN THE RECORD AND THE ISSUES INVOLVED.

Perkins, an American citizen, hailing from New York State and residing in Manila, married respondent, an American citizen, then resident in Spokane, Washington. (Findings in New York Case, R. 553; Testimony of Haussermann, R. 357.) Perkins became a law partner of one C. A. Dewitt and they became the general counsel of Benguet Consolidated Mining Co., petitioner herein, a Manila corporation (or the Philippine equivalent thereof) (R. 291), which was, and still is, headed by "Judge" John Haussermann, another American citizen, and a prominent Manila lawyer. (R. 290, 291, 292, 347.)

Stock status prior to marital dispute.

For many years prior to 1930, Perkins and Mrs. Perkins *each* held a block of stock of "Benguet" (R. 294), he receiving his dividends in checks payable in Philippine money, which he deposited in his Manila bank account; she receiving her dividends in American money by checks drawn on Benguet's American bank account in San Francisco, and made payable in American money and mailed by Benguet to Mrs. Perkins' Spokane, Washington, bank, for credit to her account there. (Testimony of Haussermann, R. 357, 367.)

Benguet delivers Mrs. Perkins' dividends to Perkins and takes his indemnity agreement.

In the spring, 1930, marital differences arose between Mr. and Mrs. Perkins, and in March of that year Perkins approached Judge Haussermann, head of Perkins' client, Benguet, and induced Haussermann to deliver to him a dividend check upon Mrs. Perkins' stock which had just been issued. The check was drawn payable to Mrs. Perkins' Spokane bank, and Perkins could not cash it. (R. 294, 295, 261.) Mrs. Perkins warmly protested this action, in her letter of April 1, 1930, to Benguet, stating that the stock and dividends were her private property. (R. 655.) June 27, 1930. (R. 657.)

Shortly thereafter and on May 26, 1930, Perkins again called on Judge Haussermann and submitted a written request for delivery of like dividend checks on Mrs. Perkins' stock, announcing that on delivery of the checks he would indorse and cash them, and agreeing to indemnify Benguet against any damages Mrs. Perkins might recover

from Benguet because of its failure to deliver the checks to her. (Findings, R. 98-100.) Dewitt, Perkins' partner, simultaneously supplied a letter containing a similar guarantee. (R. 100.)

From that time forward and until April, 1934, Benguet delivered to Perkins the dividend checks issued on Mrs. Perkins' stock, which checks were made payable to her, but nevertheless indorsed and cashed by Perkins, as he had in writing advised Benguet he intended to do. (R. 297.)

Mrs. Perkins' protests.

On June 30, 1930, Benguet by Judge Haussermann, replied in writing to Mrs. Perkins' letter of June 27, 1930, expressing regret that they could not accede to her demand for dividends because, as Judge Haussermann stated, "Your husband denies that the shares are your private or paraphernal property," and stated that Benguet's "attention has been called" that under a section of the Civil Code the dividends are properly deliverable to the husband as the manager of the conjugal partnership, and concluding with the statement "We are therefore compelled to accede to your husband's demand in this case." (R. 781.)

On December 19, 1930, Mrs. Perkins again wrote Benguet reasserting that the stock was her private property, demanding the dividends. (R. 658-659.)

The Manila litigation.

Mr. and Mrs. Perkins in 1930 began litigating their differences in the Manila Courts, in the course of which, by dint of the fact that he had induced her to withdraw

her original complaint against him, Perkins procured a default judgment for an accounting in his cross-complaint by default. Mrs. Perkins continued the litigation for several years, without there ever having been a trial "upon the merits."

The judgments rendered and orders made in the course of that litigation were as follows: (1) A default judgment on Perkins' cross-complaint, following Mrs. Perkins' withdrawal of her complaint, which the New York Court held was procured by Perkins' duress upon his wife, and which ("*mirabile dictu*") fills 24 pages of the record in this case, after many parts of it have been deleted (R. 661); (2) an order adjudging Mrs. Perkins in contempt for failure to deliver up the certificates to her husband and ordering her to jail (R. 685); (3) an order denying Mrs. Perkins' application to set aside the default judgment on ground of fraud, etc., because, although her application was filed in less than the six months permitted by the code section applicable, it was not filed within a "reasonable time," rejecting her excuse for delay that her attorneys refused to act until their fees were paid for past work, as not being a good legal ground (despite the fact that she had no money because Benguet, per Haussermann, was paying her dividends to Perkins, her husband) (R. 696, 699, 700); (4) the order denying Mrs. Perkins' petition for a writ of habeas corpus. (R. 707.)

The New York litigation instituted by Perkins.

During the pendency of the litigation and after her husband had had her incarcerated in a Manila jail under a contempt order, Mrs. Perkins left Manila and returned

to the United States. Her stock had in the meantime been deposited by her with the Guaranty Trust Company of New York. Finally in 1933 Perkins filed suit in New York to recover the stock from the Guaranty Trust Co. and set up his claim of right to the stock. (R. 483.) The Guaranty Trust Co. impleaded Mrs. Perkins, who came in with a cross-complaint against Perkins and *Benguet,* asking that she be adjudged the owner of the stock (as her separate property) and that she receive judgment against Benguet and Perkins for the dividends Benguet had been delivering to her husband, Benguet's general counsel. (Pet. p. 7; R. 483, 513.)

Although Benguet now insists that it should not be bound by the New York judgment because it was not a party thereto and had no opportunity to make a defense, it at the time rejected the opportunity afforded it and quashed service of summons upon it, upon the valid ground (which Mrs. Perkins' New York counsel were bound to recognize) that the person served was not in the real sense managing agent of Benguet (R. 639), and that any way:

> "Benguet has no vested interest in or lien upon the 24,000 shares of Benguet stock which are the subject matter of this suit." (R. 647, 648.)

Mrs. Perkins' New York judgment.

The case was tried upon its merits between Mr. and Mrs. Perkins. She lost in the trial Court but the New York Court of Appeals reversed the judgment, held the Manila decrees and orders were procured by the *extrinsic* fraud of the husband, and ordered judgment for Mrs.

Perkins, declaring her the owner of the stock and dividends. (274 N. Y. 250, 8 N. E. (2d) 849, 854; R. 549.)

Perkins did not see fit to bring the case to the notice of this Court and the judgment became final.

Although Benguet had, by affirmative action on its part, removed itself from the New York proceeding on the ground, among others, that it had no interest in the stock, it now asks this Court to hold that it was a necessary party to a determination of the issues in the New York litigation and therefore that judgment is not binding upon it.

Benguet did not rely on Manila judgment in paying dividends to Perkins.

Now as to the facts surrounding petitioner's claims based upon the Manila orders. Petitioner says that "pursuant to these judgments of the Courts of its domicile, and pursuant to the property laws of the Philippines, petitioner paid the dividends during 1930 and the following years to Perkins and his transferees." (Pet. p. 7.)

The only Manila decree or order pleaded by Benguet as an inducement to action by it with reference to the stock is the April 5, 1934 order directing transfer of the stock on the records from Mrs. Perkins to Perkins. (R. 28-29.) The other decrees of the Manila Courts are pleaded, but only as evidence of Perkins' title, not as inducing any action by Benguet. (R. 32-35.) And it is the only order or decree pleaded by petitioner as a bar to this action. (R. 18, 28.)

Judge Haussermann admitted, when on the stand in this case, that the Manila litigation did not induce him to deliver *the dividends* to Perkins.

When delivering the first of the long series of checks (they were issued regularly 4 times a year), covering the years 1930 to 1934, Haussermann did not even know Mrs. Perkins had filed suit. On cross-examination he admitted that his "attitude would not have been any different if Mrs. Perkins had not brought the suit" (R. 403), and again "in all probability I would have delivered the checks to him if he came in and demanded it" whether she had filed suit or not. (R. 404.) When delivering the checks to Perkins (it will be recalled) Benguet held the indemnity agreements of Perkins and Dewitt.

The Manila decrees other than the order of April 5, 1934, were pleaded only in support of Perkins' claim of title, not as something relied upon by Benguet in delivering the dividend checks.

April 5, 1934 order of the Manila Court.

Now as to the April 5, 1934 order of the Manila Court, directing Benguet to transfer Mrs. Perkins' stock to Perkins:

The proceeding in which that order was made is of considerable interest. Mrs. Perkins was in America, thirty days by mail one way from Manila (it was before the advent of the Clipper mail service) (R. 424); her New York suit with Perkins over the title to the stock was pending. Judge Haussermann was busy, arranging to quash the service upon Benguet in that New York case. (R. 660.)

Perkins, the attorney, secured an order in one of the Manila cases which until this time had lain dormant, directed to Benguet, his client, ordering it to show cause why it should not transfer Mrs. Perkins' stock to Perkins. (The

Petition R. 714-718; the Order to Show Cause R. 719-720.) Mrs. Perkins was not a party to the proceeding, although she was of course the *real party in interest;* no notice of the proceeding was served upon her. (R. 728.) Benguet demurred to the order to show cause (R. 728-733), but *omitted* to call to the Court's attention therein, that at that very moment Mrs. Perkins and Perkins were litigating the ownership of the stock in New York. In fact at the hearing Judge Haussermann and Benguet's counsel maintained silence as to the New York litigation. (Haussermann R. 433.) The order was signed April 5, 1934. (R. 765-766.) On April 11th Benguet reported its "compliance" with the order. (R. 777-778.) From the filing of the petition to the "compliance" with the order by Benguet, but 28 days intervened.

Judge Haussermann testified at the trial of this case that at the time of complying with the order, he and his counsel believed it to be *absolutely void* and that he still retained that opinion. (R. 421, 422.) Yet he did not appeal from the order, but promptly sat down with Mr. Perkins, *took another agreement of indemnity from Perkins* and transferred the stock to him; and then wired Benguet's representative in the United States *to cooperate with Perkins' New York attorney* in having the service on Benguet quashed in the New York case, and as we have said the service was quashed. (R. 395, 430, 431.)

From the foregoing facts it will be observed that Petitioner Benguet:

(1) Recognized, until the April 1934 order, that Mrs. Perkins was the stockholder and entitled to dividends on the stock, by issuing the checks in Mrs.

Perkins' name, although (against her protest) delivering the dividend checks to Perkins and accepting his endorsement thereof.

(2) Began the practice of paying the dividends on Mrs. Perkins' stock in 1930 before it knew of the pendency of any action filed by Mrs. Perkins against Perkins, and would have continued paying them (until learning of the New York judgment in favor of Mrs. Perkins) even if no suit had even been filed by her in Manila.

(3) Placed no reliance on the April 5, 1934 order of the Manila Court, but believed at the time of the alleged "compliance" that it was absolutely void and apt to be set aside; and accepted another indemnity agreement from Perkins before making the transfer.

(4) Made the transfer of April 1934 *"pendente lite" of the New York case,* in which the jurisdiction of the Manila Courts were under attack, and knowledge of the pendency of which action Benguet collusively withheld from the Manila Court which issued the order of April 5th.

ERROR IN THE PETITION.

On pages 5 and 6 of the petition, petitioner says:

"The stock was placed in the name of Mrs. Perkins, but under the law of the Philippines, which determines the property rights in this stock, the stock was the property of the conjugal partnership and as such

was subject to the sole management and control of the husband."

This is merely a statement of Perkins' contention. Petitioner has failed to cite the pertinent section of the Civil Code of Spain, to-wit: Article 10, which reads as follows:

> "Personal property is subject to the laws of the nation of the owner thereof, real property to the laws of the country in which it is situated."

See

Perkins v. Guaranty Trust Co., 274 N. Y. 250, 8 N. E. (2d) 849 at 852,

in which the New York Court of Appeals after quoting that section of the code, called attention to the fact that Mr. and Mrs. Perkins were citizens of the United States and by virtue of the fact that New York was the place of Perkins' last American residence, the New York law applied, and that under New York law the stock in the name of Mrs. Perkins was her property.

The decision of the New York Court of Appeals in *Perkins v. Guaranty Trust Co.*, also discloses that Mrs. Perkins was originally of the opinion that the section quoted by petitioner applied, but after the taking of the default judgment against her by her husband in the summer of 1930, she discovered that the above quoted Article 10, and through it, the New York law applied.

On January 5, 1931, Mrs. Perkins filed in the Manila Court a petition seeking to set aside the default judgment against her by her husband and setting up the facts showing that she and her husband were American citizens

and citizens of New York State, and that the above quoted Article 10 of the Civil Code of Spain applied. The Manila Court in its order of March 6, 1931 denied her petition. The order recites the contents of Mrs. Perkins' petition and her reference to the New York law. (R. 696 at 699.)

We shall now answer the law points raised in the petition herein.

I.

ANSWER TO PETITIONER'S POINT THAT "THE DECISION OF THE COURT BELOW HOLDING PETITIONER CONCLUDED BY A JUDGMENT TO WHICH IT WAS NEITHER A PARTY NOR PRIVY DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND IS IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT." (The Petition, p. 12.)

As a matter of first impression, one would be inclined to say as did the California Supreme Court in *Estate of Thomas,* 147 Cal. 236, that

> "It is not easy to see how a corporation is a necessary party to a controversy between third parties as to the ownership of particular shares of stock."

A corporation, confronted by two claimants to the same shares of its stock, can remain absolutely neutral by *either* interpleading the dividends as they come due and compelling the parties to litigate the title *or* by withholding the dividends until the title has been finally determined.

In the first of the foregoing alternatives the corporation makes the Court a stakeholder. In the other it makes

itself a stakeholder. In neither case would the corporation be a necessary party to the ensuing litigation, nor should it be interested in it in the slightest degree.

Now if a corporation sees fit to favor one of the claimants (and in this case the favored claimant was not the stockholder of record, but the other claimant—the corporation's general counsel), it would seem unreasonable to say that by so doing the corporation places upon the stockholder the burden of establishing her title against the corporation, *after* having established it against the other claimant.

Here petitioner took from one claimant (Perkins) and his law partner *indemnity* agreements protecting it against just such a suit as this. (Findings herein, R. 98-102.) Afforded an opportunity to take part in the New York litigation between the two claimants, it refused it, expressly disavowing, as we have heretofore shown, any interest in the controversy. (R. 647-648.) "We didn't want to be dragged into the New York case," says Judge Haussermann. (R. 430.) But now that its preferred claimant, Perkins, lost that case *upon the merits,* they insist Mrs. Perkins should retry the issues of that case and give Benguet a chance to step into Perkins' shoes and prove his title for him.

Cases relied upon by California Courts.

Two cases directly in point were called to the attention of the California Courts and were used as precedents in the opinion of the District Court of Appeal (R. 824-825), viz:—a decision of the New York Court of Appeals in *Hughes v. United Pipe Lines,* 119 N. Y. 423, 23 N. E.

1042, and the Iowa Supreme Court's decision in *Commercial Bank v. Allaway,* 207 Iowa 419, 223 N. W. 167. Those cases are analyzed in the opinion of the California District Court of Appeal. (R. 824-825.) The basis of each decision is that if a third person injects himself into the controversy between two claimants to title, it could do so only by stepping into the shoes of one of the claimants and making his fight for him, but that such action could not be taken by him after that claimant had already litigated his title with the other claimant and lost.

To pass to petitioner's discussion of the point: In the effort to bring petitioner outside the privity rule, petitioner proves (we believe) the unreasonableness of its contention, by its statement on page 13 of the petition that:

> "It (Benguet) had no interest in the issues between Mr. and Mrs. Perkins therein (in the New York case) litigated; it had succeeded to no interest. It had no opportunity in that action to show it had paid its true debtors."

If it had no interest in the issues of the New York case which was whether Mr. and Mrs. Perkins was entitled to the stock and the dividends therein—it could not have been a necessary party and was not entitled under the due process rule to be heard. It did have an opportunity to be heard in the New York case, but wasn't interested and didn't want to be dragged into it, so declined the opportunity. If it had no interest in the litigation, why should it now be permitted to show that it paid the dividends to the claimed rightful owner—surely it cannot be held that after the rights of the two claimants have

been finally adjudicated between themselves, Benguet can come into Court and prove the unsuccessful litigant the owner. The logical result of such contention if upheld would be two final judgments, one adjudging Mrs. Perkins to be the owner of the stock and dividends and the other adjudging ownership in Mr. Perkins. How these two final judgments could be legally reconciled, we are not advised.

Benguet neutral until Mrs. Perkins the victor.

Judge Haussermann, head of Benguet and no mean lawyer, when asked why up to April, 1934 Benguet had not intervened, said:

> "That never occurred to me, because the whole matter seemed to me at that particular time to be going through the Courts of the Philippine Islands. It didn't seem necessary for Benguet—we were not a party to that, and they were fighting over it. In due course of time, I assumed, there would be a judgment with reference to that particular matter, and I saw no reason why we should intervene in those actions." (R. 431.)

When called upon to explain what protection he provided for Benguet in the event the April 5, 1934 order of the Manila Court, should be declared void (as it was by the New York Court) he said:

> "The whole matter was in the courts as I thought at that particular time, and I thought in due course there would be a final judgment rendered in which all of these matters would be definitely settled." (R. 437.)

In other words, Benguet was willing to abide by the decision of the Courts in which Mr. and Mrs. Perkins

were litigating the title to the stock, provided the ultimate decision was in favor of its preferred candidate. The decision went for Mrs. Perkins (the original stockholder of record) so Benguet asks this Court to require Mrs. Perkins to retry her title with Benguet as a party —so that Benguet might fight Perkins' battle over again.

Petitioner's citations.

Petitioner cites under this head four decisions which we shall refer to in order. *Hansberry v. Lee,* 311 U. S. 32, in our opinion, falls far short of supporting petitioner's contention that the due process rule has been disobeyed in the present case. It holds that judgments *can operate as res adjudicata* as to strangers, without violating the 14th Amendment—in class suits, where the interests of those not parties to the action are fairly represented by those members of the class who are parties. For as Justice Stone expresses it:

> "This Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." (311 U. S. 42.)

How better could a corporation be protected in a suit of the kind now before the Court, as to title—than by having the defense conducted by the party litigant upon whose title the corporation prefers to rely.

The decision in *Postal Telegraph v. Newport,* 247 U. S. 464 is not in point because there the trial Court erroneously held that a judgment rendered against the defendant's successor in title, *who took title before the action was instituted,* was binding as *res adjudicata* against de-

fendant. In other words, had Mrs. Perkins sued Benguet alone and secured a judgment decreeing her the owner of the stock (as against Benguet), that judgment would not have been *res adjudicata* against Perkins. The reasons are obvious.

We are at a loss to understand petitioner's excuse for citing *Riley v. New York Trust Co.*, 315 U. S. 343. The decision in that case goes no further than to hold that each state in which a decedent has lived has the right to determine whether or not his domicile was in that state for probate purposes, and that a decree of a probate Court in Georgia was not binding upon the administrator C.T.A. in New York, who was a stranger to the Georgia proceedings. The reason (expressed in Justice Reed's main opinion and in Justice Stone's concurrence) for the ruling on the latter point, prevents the case from being a precedent favorable to petitioner, is that the New York administrator was representing the state and New York creditors and therefore his interest *was adverse* to the Georgia heirs and to the Georgia executor, and he therefore could not be considered as being fairly represented by them. *The converse is true here*—Perkins was defending the very claim of title Benguet seeks to assert—Benguet here merely seeks to step into Perkins' shoes. Benguet was adequately represented by Perkins, who not only was the real party in interest as far as Benguet is concerned, but, strangely enough, was the attorney selected by Benguet to act as its general counsel over the years.

In *Chase National Bank v. Norwalk*, 291 U. S. 431 this Court held that a judgment of ouster against a Power Company did not operate as *res adjudicata* against a

trustee who held the legal title to the Power Company's equipment, poles etc., to secure the payment of the bonds issued by the company, where the trustee was neither a party to the former action or shown to have known of its existence. The general language, from that opinion quoted on page 16 of the petition herein, cannot aid petitioner's cause—for there this Court was discussing persons "absolutely entitled to a hearing", and having "legal rights" to be affected. Benguet was not entitled to a hearing in the New York case (although given the opportunity of one) and had no "legal rights" to be determined in the New York action, for the very obvious reason that the only issue involved was the ownership of the stock and its dividends and as we have shown Benguet denied it has an interest in or lien on the stock or dividends.

Petitioner concludes its argument on this point by calling attention to the fact that it is being held for "nearly a half million dollars by the California Court for doing what was required of it by the Court of its domicile." This is a very great exaggeration. We have shown in our statement of facts Benguet's admission that prior to the April 5, 1934 order of the Manila Court (on the proceedings in which Mrs. Perkins was neither a party nor served with process) it did not rely on any Court proceedings in giving to Perkins the dividend checks which were payable to Mrs. Perkins; and that after May 26, 1937, when it received notice of the New York Court of Appeals decision in favor of Mrs. Perkins, it impounded all dividends on the stock remaining in Perkins' hands, whether a part of the certificates in dispute or not.

And that when transferring Mrs. Perkins' stock to Perkins in "compliance with" the April 5, 1934 order, Haussermann admitted that together with Benguet's attorneys he believed and at the time of the trial of the case still believed the order was absolutely void—in which belief they were affirmed by the New York Court of Appeals.

And during all of this time Benguet held the indemnity agreements of Perkins and Dewitt.

II.

ANSWER TO PETITIONER'S POINT THAT: "THE DECISION OF THE COURT BELOW DENIES FULL FAITH AND CREDIT TO THE PHILIPPINE ADJUDICATIONS IN VIOLATION OF SEC. 905 OF THE REVISED STATUTES AND IN SO RULING MISAPPLIES THE DECISION OF THIS COURT IN TREINIES v. SUNSHINE MINING CO." (The Petition, p. 18.)

The question of whether the New York judgment is *res adjudicata as against Benguet* has already been discussed, and that point is not involved under the present heading.

The question here raised by petitioner is whether the California Court, by adopting the decision of the New York Court, which in turn declared the Manila judgment and orders void, denied to the Manila decrees the full faith and credit required by Sec. 905 of the Revised Statutes.

We believe that this Court's decision in *Treinies v. Sunshine Mining Co.*, 308 U. S. 66 (referred to on page 19 of respondent's petition) conclusively disposes of this

point. There an Idaho Court refused to follow the prior decision of a Washington case on the ground the latter Court lacked jurisdiction to decide the cause, and a Federal District Court in Idaho accepted the later judgment, that of the Idaho Court. This Court found that the Idaho Court had a right to look into the jurisdiction of the Washington Court and its rejection of the Washington judgment did not operate as a denial of full faith and credit to the judgment of a sister state.

As the decision of the New York Court of Appeals in the Perkins case (274 N. Y. 250, 8 N. E. (2d) 849) so clearly shows—it was rejecting the Manila default judgment and decrees, on the ground that the Manila Court lacked jurisdiction of the original proceedings because of Mrs. Perkins' withdrawal of her complaint, and that her consent to Perkins' judgment on his cross-complaint was procured by the husband's fraud and duress, and the so-called supplementary proceedings of April 1936 were void because Mrs. Perkins, the real party in interest, was not a party and was not served. The New York Court under the precedence of the *Treinies* case had the right to pass on and decide the jurisdiction of the Manila Court, and, having decided, its judgment was entitled to the full faith and credit the California Court gave it.

The case of *Mueller v. Mueller,* 124 Fed. (2d) 544, is of no assistance to petitioner. There the third Court to pass on the matter (a Federal District Court) refused to recognize the judgment of an Arkansas Court, because that Court lacked jurisdiction and failed to give full faith and credit to the judgment of a Minnesota Court, the first Court to try the issues. That decision is consistent with

the Treinies decision and the California Court's decision in the present case. The New York Court in the Perkins case, under the authority of the *Treinies* case, had a right to inquire into the jurisdiction of the Manila Court and it found a lack of jurisdiction. The California Court had a right to inquire into the jurisdiction of the New York Court in the present case before giving that judgment full faith and credit. It found jurisdiction existed (and petitioner has never charged that the New York Court lacked jurisdiction) and gave full faith and credit to the New York judgment.

A quick reading of the decision in *Hammell v. Britton,* 19 Cal. (2d) 72, will immediately reveal that the Court was dealing with a series of doubtful activities by one of the litigants, and that the decision throws no light on the issue here under decision.

Martin v. Fritz, 228 Iowa 482, 292 N. W. 143, is likewise not in point. It merely shows that the Iowa Courts resent the refusal of the Courts of other states to enforce Iowa judgments.

In *Grimm v. Barrington,* 109 Mo. App. 35, 84 S. W. 357, cited on page 21 of the petition, a Missouri Court which had *formerly* decided the case in favor of the plaintiff, refused to recognize the judgment of a New Jersey Court later rendered in favor of defendant. The case is not in point, principally because the plaintiff of the original Iowa case, when sued by the defendant therein, in the New Jersey case did not set up his Iowa judgment—so the New Jersey Court never passed upon the sufficiency of the jurisdiction of the Iowa Court when rendering the first judgment.

We have shown in our discussion of the facts herein that there was no trial on the merits in the Manila proceedings; that Benguet delivered none of the dividends in reliance on any Manila proceedings; that in the only proceedings in which Benguet was a party, Mrs. Perkins was *not* made a party, and Benguet and its attorneys in transferring Mrs. Perkins' stock to Perkins in purported compliance with the April 5, 1934 order culminating those proceedings, believed the order absolutely void and apt to be set aside, but did not appeal or advise the Court making the order that at that very time Mr. and Mrs. Perkins were fighting out the question of title in New York.

The New York Court held all of the Manila orders void on jurisdictional grounds which under the rule of the *Treinies* case it had the authority to do. (274 N. Y. 250, 8 N. E. 849, 855-857.)

If the New York Court had failed to give "full faith and credit" to the Manila decrees, Perkins had his remedy in the form of a petition to this Court. He failed to pursue such remedy, obviously because he and his counsel realized its futility. Benguet therefore cannot do that for him at this late date.

III.

ANSWER TO PETITIONER'S POINT THAT: "THE DECISION OF THE COURT BELOW DENIES TO THE NEW YORK JUDGMENT THE SAME FAITH AND CREDIT IT HAS BY LAW AND USAGE IN NEW YORK, CONTRARY TO THE FULL FAITH AND CREDIT CLAUSE AND TO THE DECISIONS OF THIS COURT." (The Petition, p. 22.)

Petitioner's contention apparently is that under New York law as it existed at the time of the judgment in the Perkins case, Mrs. Perkins by taking judgment against Perkins elected not to look to Benguet; and that the California Court in this case by not recognizing this claimed effect of the New York judgment failed to give it the "full faith and credit" to which it was due.

What petitioner really complains of is that the California Court gave the findings of the New York Court *too much faith and credit,* and what the petitioner urges is that the California Court should have ignored the findings of the New York Court, because the very bringing of the action constituted an election of remedies, precluding the institution of the California action.

Ignoring the question of whether California or New York laws governs on this point, we shall assume for the purposes of this reply that the New York law applies.

Petitioner's reliance is on the decision of the New York Court of Appeals, in *Fowler v. Bowery Savings Bank,* 113 N. Y. 450, 21 N. E. 172 (rendered in 1889), which held that where a bank paid money in a commercial account to the wrong person, the depositor by seeking to collect from that person, waived the right to look to the bank. It was one of those cases where the Court sought to protect the bank which was innocent of any wrong. The

unsoundness of the decision is evidenced by the remark in the course of the opinion that if the account had been a "special deposit", there would have been no election.

The *Fowler* case is not at all determinative for the reasons that:

(1) *The rule it asserts* was abrogated by

(a) A decision rendered by the same Court in *1933* (years after the *Fowler* case was decided and 3 years prior to the decision in the Perkins case), holding directly to the contrary, in the case of *City of New York v. Bronx Trust Co.*, 261 N. Y. 64, 184 N. E. 495;

(b) The adoption in 1928 of Section 232 of the "Debtor and Creditor Law", which provides that

"Judgment against one or more of several obligors or against one or more joint or joint and several obligors, shall not discharge a co-obligor who is not a party to the proceedings."

(Sec. 231 of the same law declares that "obligor includes a person liable for tort".)

(2) Mrs. Perkins did not have a free election—she was impleaded into the case by Guaranty Trust Company (see Petition herein, p. 7, last paragraph) and had she not appeared to set up her title, judgment would have been taken against her.

The *Bronx Trust Co.* case (supra) leaves no doubt as to the New York Court of Appeals' attitude toward the

point at issue, and in doing so destroys the value of the *Fowler* case as a precedent. In the *Bronx Trust Co.* case warrants of the City of New York were forged and cashed by the trust company. The city first pursued the forgers and recipients of the moneys, recovered part of the moneys and sued the trust company for the balance. The Court held that there was no election; that "election of remedies is a defense only 'when a choice is exercised between remedies which proceed upon irreconcilable claims of right' and has no application to the pursuit of remedies concurrently liable, short of payment or satisfaction".

Certainly Mrs. Perkins' rights against Benguet and Perkins were concurrent and each predicated upon the identical claim of title to the stock in her.

Not only was Mrs. Perkins compelled to appear in the New York case when impleaded, but when she did appear she sought to make Benguet a party, but that corporation got out of the case on a motion to quash, based upon the fact that it had no managing agent in this country, *and was not interested in the stock or dividends,* the subject matter of the suit. (R. 639 and 648.)

So there is no picture here of a free election. That a party cannot be bound by the election of remedy rule, where he or she has to appear in the original action has been definitely recognized in:

Friend v. Talcott, 228 U. S. 27, 32;

Postwick v. Cutten, 258 App. Div. 218, 15 N. Y. S. 877, 879;

Meyer v. Price, 250 N. Y. 370, 165 N. E. 815, 816.

As this Court said in *Friend v. Talcott* (supra), "It is impossible to conceive of a right of election in a case where no such right existed".

There are other reasons why this point of petitioner is not well taken: Such as the fact that the remedies against Perkins and Benguet are consistent, being based upon the same claim of title; and the fact that the effort to collect from Perkins was not a detriment to Benguet, but on the contrary would have been a benefit to it, if collection against Perkins had been made. They are fully discussed in the opinion of the California District Court of Appeal. (R. 828-837.)

CONCLUSION.

The granting of the petition herein would pave the way for a retrial of the title to the stock in question, after the two claimants to the stock have already pressed their claims to a final judgment. And if a retrial of those issues were had, it would be for the benefit of a litigant who could offer no evidence of its own rights, but solely present evidence in support of the claim of the unsuccessful claimant in the earlier action.

If a retrial were had and it was there determined that Perkins was entitled to the stock and dividends, there would result the anomaly of Mrs. Perkins being the owner so far as Perkins was concerned, and Mr. Perkins being the owner so far as Benguet was concerned.

How could such a situation be unscrambled?

We respectfully submit that reason and the authorities are against petitioner's position.

Dated, San Francisco, California,
June 2, 1943.

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